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Book Reviews

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BOOK REVIEWS

THE LAW OF HOMICIDE. Roy Moreland. Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1952. Pp. viii, 338.

In the form of a systematic review of both the common law rules and their statutory counterparts relating to the law of homicide, Professor Moreland has here presented a concise and coherent statement of existing law together with his recommendations for a model statute on the subject. A brief historical introduction, dealing with the law of homicide prior to the eighteenth century, is followed by an examination of each of the forms of common law homicides, that is intentional murder, negligent murder, the felony murder, the killing of an officer while resisting arrest, voluntary manslaughter, and involuntary manslaughter. His analysis of statutes dealing with these crimes, and with negligent homicide arising from the operation of a motor vehicle, is followed by a discussion of possible defenses. Copious footnotes and ample cross references illustrate and integrate the points considered in the text while the accompanying tables and index make cited material readily available.

According to the author, the term "malice aforethought" must go because, having many meanings, it is a source of confusion. In its place, he would substitute the phrase "deliberate and premeditated intent," defining the latter carefully. Further, he indicates a belief that the felony murder doctrine, as such, should be eliminated, suggesting, as a transitional step, a statute which would confine the doctrine to cases involving arson, rape, robbery, or burglary, and providing for the punishment of this form of homicide as second degree murder. He joins with other authorities in attacking the doctrine that the unintentional killing of an officer while resisting an arrest should be treated as a murder and would, instead, place criminal responsibility not upon the lawfulness or unlawfulness of the act but solely upon the wantonness or barbarousness of the particular act for which the defendant is being held responsible.

Most welcome to lawyers and judges alike should be the inclusion of a careful examination of the law of criminal negligence in manslaughter. The need for an accurate definition of criminal negligence at this level of homicide is demonstrated, beginning at page 62, by the discussion of the variety of unsatisfactory pegs on which convictions have been hung. As the author states, at page 120, "judges have not frankly faced the issue whether criminal negligence is objective or subjective." Having examined the cases, and with the tort standard in mind, the author offers a proposed statute which would define criminal negligence in terms of conduct "recklessly disregardful" of life or property, utilizing the standard

of the reasonable man. The objective standard thus employed is supported on the ground that "societal harm," not moral wrongdoing, is the thing involved.

As with the felony murder doctrine, so also with the misdemeanor-manslaughter doctrine, Professor Moreland believes present concepts should be done away with, principally because, being based on the "unlawful act" idea, that doctrine has also been the source of much confusion and does not evaluate the relative dangerousness of the defendant to society. Cases coming within the doctrine would, under his proposed scheme, stand or fall under the tests of criminal negligence for murder and manslaughter respectively. Various defenses, including those of self-defense and of insanity, are treated and a model insanity statute has been suggested, one intended to employ the several McNaghten rules on the point but also including the concept of degrees of insanity.

On the whole, the treatise has been carefully prepared, is thoroughly documented, and is readable as well as precise. Adoption of the orthodox pattern on the subject facilitates correlation of the contents of this book with other well-known standard works on homicide. Only the course of time could provide a test for the author's model statute, but it is evident that his review of existing authorities, his rejection of unsound doctrine, and his efforts to sift modern attempts at codification, have resulted in the production of a treatise which, revealing the excellence of the author's scholarship, should become a work of great utility.

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TRIAL JUDGE. Justice Bernard Botein. New York: Simon and Schuster, 1952. Pp. 337.

Biographical works dealing with the lives of Chief Justices, Supreme Court judges, eminent lawyers, and even with those of common attorneys, have been issued by the score, but a publication dealing with the experiences of a nisi prius judge may be considered something of an anomaly, particularly when it is one written and published by a living member of the trial bench of one of America's most densely populated counties. This book is even the more noteworthy for it is not simply a chronological account of a man's birth and growth, or a journal of his day-to-day actions, so much as it is a fascinating, candid, behind-the-bench record of impressions gathered from ten years of varied trial court experience. Written primarily for laymen, and only secondarily for lawyers, the book nevertheless furnishes an intimate and helpful message for all who may have occasion to appear before a trial judge.

Hundreds of pages have been written on the point of the appropriate way to try a case, to present evidence, to cross-examine successfully, to argue to a jury, or on court-room conduct in general. Too frequently, such works, if not merely anecdotal in character, deal with their subject matter from the viewpoint of the trial attorney, hence seldom consider the effect such efforts may have on the presiding judge. Not least among the merits of this work, then, is the fact that through it the author provides the other side of the story as he reveals the thoughts which race through the mind of the judge while he observes the court-room scene from his elevated position. The book is not lacking in those revealing anecdotes, both personal and impersonal to the author, which often become the means whereby to drive home important lessons. Stories do here abound, illustrating those influences which could play on a court, touching the difficulties which may be encountered with lawless jurors, concerning the inadequacies of trial procedure, and narrating the dangers to be found in lawyers' tricks. They furnish, however, no more than the frame around which to present the many sound utterances of judicial wisdom.[1]

Trial term in a substantial court in any large county brings many diversified cases up for hearing. Any judge who has been torn over a custody hearing, who has pondered the best solution for a large reorganization, who has struggled with exaggerated claims regarding personal injury, or who has groped for the intention of contracting parties, will endorse the remark of the author that, so considered, the lot of the judge is not an enviable one. Such judges will, of course, agree that there are compensating factors but how many others realize the full scope of the trial judge's responsibility or count the hours of effort entailed in the proper discharge thereof, If they would learn, the answer is here available in as interesting a form as has ever before been presented.

THE STATES AND SUBVERSION. Walter Gellhorn, Editor. Ithaca, New York: Cornell University Press, 1952. Pp. vii, 454.

Six chapters of this book, devoted to a review of state experience in the investigation of alleged communistic activity believed intended to overthrow democratic government, provide a report on the actions, the

[1] The judge occasionally nods. See, for example, page 322 where his Honor states: "Then to bed, where I read a few pages of an erudite article in a current law school review. As usual, this was an irresistible soporific, so I soon turned off the bed lamp and went to sleep." Or consider page 329, where it appears that by the time the judge had disposed of some motions he was ready for bed. In the words of the author, "Although I was tired, my brain was spinning too rapidly to augur well for a restful night. So I dipped into a *Law Review* article, which soon produced the usual and desired effect." Some law review, touched at a sensitive point, may call him to account for misusing its pages as a sleep-inducer!

achievements, if any,[1] and the by-products of state investigative committees in Maryland and New York in the east, in California and Washington to the west, and Illinois and Michigan in the central area. Each report, though prepared by a different author, tends to disclose a discouraging picture of overzealousness run riot to the point where democratic freedoms would appear to have suffered more from danger within than without, from partisans than from enemies, while the country has been exposed to a witch-hunt of greater ferocity than anything developed in the early days of Salem, albeit one far less productive of tangible result. These reports provide a commentary on committee techniques, on committee practices, and on the methods of the opposition, which should be read by all citizens, although they might have been brought up to date before republication occurred.[2]

The final chapter of this book, prepared by a well-known worker in the field of civil liberty, serves to summarize the lessons to be learned from these attempts to root out disloyalty toward the American form of government. At the same time, the editor points to what better could have been done. A "slight enlargement of calm and common sense," he indicates, should accomplish far more than a piling up of bulwark after bulwark in the form of statutes, often of doubtful validity, directed against opinions and associations rather than concentrating on actions. Some of these statutory proposals, he notes, border on the ludicrous, such as the one that all school buses, in a parade of blatant patriotism, should be painted in red, white and blue stripes. Others he considers to be more offensive in their sterile approach to what he thinks should be a program of affirmative character. The vapidity of a requirement for an oath, so frequently made the basis of current recommendations, backed with no more than the doubtful sanction of a prosecution for perjury, could hardly be said to fill the bill. Statutory direction for removal from office, or for

[1] The record of state achievement, as opposed to claim, reads a little like the story of the small girl who burst into the house exclaiming about the "million cats in our back-yard." Pressed for details, she replied "There's at least a thousand!" Challenged still further, she ended up by saying "Well, there's our cat and the one from next door!"

[2] The chapter on New York by Dean Chamberlain of Columbia College, for example, represents a condensation of his Loyalty and Legislative Action (Ithaca, New York, Cornell University Press), published in 1951, at which time the Feinberg Law of that state was still before the courts. The later history is now disclosed in the more recent decision in Adler v. Board of Education, 342 U. S. 485, 72 St. Ct. 380, 96 L. Ed. 517 (1952). It could also be pointed out that the Ohio law requiring an oath from a recipient of unemployment compensation benefits and a California ordinance imposing a similar test on public employees have received judicial examination. See note in 29 CHICAGO-KENT LAW REVIEW 255-60 (1951), on Dworken v. Collopy, 91 N. E. (2d) 564 (Ohio Com. Pleas, 1950), and Garner v. Board of Public Works, 98 Cal. App. (2d) 493, 200 P. (2d) 958 (1950). The decision in the last mentioned case was subsequently affirmed in 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951).

the denial of other governmental benefits, borders perilously close to interference with a constitutional freedom to believe even the unpopular thought. So also as to other suggestions which have been made, but the book should be left to speak for itself.

One other valuable feature is to be found in the form of two appendices. The first of these classifies the several types of state law regarding subversion and subversive activities. The other depicts the extent to which, state by state, such measures have been adopted. The whole, therefore, forms a scholarly work likely to operate as a corrective in an area where much of what has been written and said has been the product of inquisitorial vehemence rather than founded on fact.